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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

WANG JIAQING et al., Plaintiffs and Appellants, v. CITY OF ALBANY, Defendant and Respondent.	A123509 (Alameda County Super. Ct. No. RB06254229)

Plaintiffs sued the City of Albany for the death of their son, which resulted from the high-speed pursuit of a suspect by an Albany police officer. The trial court sustained a demurrer without leave to amend on the basis that the City had adopted a written pursuit policy under Vehicle Code section 17004.7, rendering it immune from suit. In a prior appeal, we reversed the trial court's order sustaining the demurrer. In our prior decision we analyzed the City's vehicle pursuit policy and concluded that it complied with the requirements for statutory immunity. We reversed, however, on the ground that the trial court had improperly taken judicial notice of the date of adoption of that policy.

On remand, the City moved for summary judgment. Plaintiffs opposed the motion, again arguing the City's vehicle pursuit policy did not comply with the requirements of the statute. The trial court granted summary judgment. It also awarded attorney fees to the City as sanctions because of Plaintiffs' continued argument that the City's pursuit policy was statutorily defective. We affirm the judgment but reverse the award of fees.

I. BACKGROUND

In February 2005, City of Albany police pursued a vehicle driven by a suspect fleeing from a traffic enforcement stop. The high-speed chase proceeded through Albany and into Berkeley, where it ended in a collision that resulted in the death of Jie Wang, the son of appellants Wang Jiaqing and Zhang Baozhen (Plaintiffs).

A. The Demurrer and Prior Appeal

In February 2006, Plaintiffs filed this wrongful death action against the City of Albany (City) and others. The City filed a demurrer, contending it was immune from liability under Vehicle Code section 17004.7[1] because it had adopted a vehicle pursuit policy (Policy) in compliance with the statute. After a hearing, the trial court issued a written order on May 18, 2006. The court took judicial notice of the City's adoption of the Policy, rejected Plaintiffs' argument that the Policy failed to meet statutory requirements, sustained the demurrer without leave to amend, and dismissed the complaint as to the City.

In appealing that dismissal, Plaintiffs argued here, as they had in the trial court, that the Policy did not sufficiently set forth the required procedure for coordinating pursuits with other jurisdictions as required by section 17004.7, subdivision (c)(3). (*Wang v. City of Albany* (June 29, 2007, A114594) [nonpub. opn.] (*Wang I*).) Plaintiffs further argued that the court erred in taking judicial notice of the adoption of the Policy, and the effective date of that adoption, based on a declaration of the Albany Chief of Police. (*Ibid.*)

Both issues were fully briefed, but we asked counsel, by letter, to focus argument on the judicial notice issue. In our opinion, we concluded that the Policy met statutory requirements, but that the trial court had erred in taking judicial notice of the date of adoption of the policy, and we therefore reversed. (*Wang I, supra,* A114594.)

We wrote: "The [judicial notice] contention has merit. We will nonetheless begin by analyzing the statutory adequacy of the Policy, in order to assist the trial court and the

[1] All statutory references are to the Vehicle Code unless otherwise indicated.

parties in the adjudication of the case after remand." We thoroughly analyzed the Policy under the statutory criteria and considered and rejected Plaintiffs' three arguments that the Policy did not comply with the statute. We concluded, "The Policy meets the requirements of section 17004.7, subdivision (c)." We then explained that the trial court had erred in taking judicial notice of the declaration of the City's police chief and concluded, "The judgment must therefore be reversed." Referring back to our conclusion that the Policy complied with section 17004.7, subdivision (c), we explained: "We recognize the public interest in resolving matters regarding vehicle pursuit policies expeditiously. It is in respect of this concern that we proceeded in this opinion to analyze the legal sufficiency of the Policy. This public interest, however, does not change the plain language of the judicial notice provisions of the Evidence Code. In this particular case the adoption date of the Policy cannot be established by judicial notice." Accordingly, we reversed the judgment and remanded the case to the trial court. (*Wang I, supra,* A114594.)

B. The Summary Judgment Motion

On remand, the City moved for summary judgment, arguing that the only unresolved issue was the date on which the Policy was adopted. "[T]he Court of Appeal has fortunately determined [the Policy] was both properly adopted by the Albany police chief and . . . met the requirements for immunity under 17004.7," the City argued.[2] The City submitted evidence of the Policy's adoption date, including the police chief's declaration, and argued that no triable issue of fact remained.

In opposition, Plaintiffs raised four arguments: (1) the Policy was not validly adopted because the police chief did not follow the requirements of the Administrative Procedures Act (APA); (2) the Policy was not validly adopted because the police chief

[2] In the prior appeal, we ruled that "A vehicle pursuit policy is sufficiently adopted if promulgated by the chief of police. [Citation.] Thus, the dispute in this matter is not whether the Policy could be adopted by action of the City of Albany's police department through its chief, but the factual question of the date on which the adoption occurred." (*Wang I, supra,* A114594.)

did not comply with the Ralph M. Brown Act (Gov. Code, § 54950 et seq.); (3) assuming the Policy was validly adopted, a factual dispute existed as to its adoption date; and (4) the Policy did not comply with section 17004.7, subdivision (c). On the last issue, Plaintiffs argued that our analysis of the Policy in the prior appeal was dicta with no precedential effect.[3] Plaintiffs then revived the arguments they had made in opposing the demurrer and in the first appeal regarding the Policy's compliance with section 17004.7, subdivision (c) and responded to certain statements in our opinion in that appeal.

In reply, the City wrote, "It is incomprehensible how Plaintiffs could interpret the . . . clear language and 15 pages of detailed analysis [of *Wang I*] as mere 'dicta.'. . . [¶] . . . [¶] As the Court of Appeal indicated, the single, narrow issue on summary judgment is the adoption of the (sufficient) pursuit policy and that issue has now been exhaustively explored . . . such that this Court may now finish what could technically not be achieved at the demurrer phase of litigation."

The trial court granted summary judgment. "There are no issues of material fact as to whether the City of Albany adopted a pursuit policy in compliance with Vehicle Code § 17004.7 prior to the pursuit at issue in this case. The policy was properly promulgated by the Chief of Police and complies with the requirements of Section 17004.7. [¶] There is no material dispute that the Policy was adopted and went into effect in October of 2004 . . . . [¶] Plaintiffs' argument that the adoption of the Policy did not comply with the [APA] is without merit. The APA does not apply to local agencies. [Citations.] [¶] Plaintiffs' argument that the adoption of the Policy was done in contravention of the Brown Act, [citation], likewise fails. . . . [¶] At the hearing the plaintiffs argued that a triable issue of fact still existed on the question of whether the City's vehicle pursuit policy complied with law. This argument is of no avail. The Court

[3] Plaintiffs wrote, "[T]he appellate court's decision was based on the trial court's error in taking judicial notice of the adoption of the pursuit policy in question. [Citation.] The appella[te] court acknowledges that the analysis of the statutory adequacy of the policy was meant only to 'assist the trial court and the parties in the adjudication of the case after remand' and had no binding precedential effect."

of Appeal has already ruled to the contrary. In the first paragraph of its decision . . . , it ruled: 'We conclude that the Policy meets the statutory requirements.' " The court entered judgment for the City.

C. The Attorney Fees Award

The City then sought an award of attorney fees on the ground that Plaintiffs had maintained their action in bad faith and without merit. While conceding that Plaintiffs had "some minimal level of good faith at the outset of this litigation," the City argued that Plaintiffs' opposition to the City's summary judgment motion following the first appeal was "frivolous" and demonstrated bad faith. "[R]ather than limiting themselves to the very narrow issue of adoption as clearly identified by the Court of Appeal," the City argued, Plaintiffs "[r]aised a completely inapposite and frivolous argument[s]" that the City failed to comply with the APA and the Ralph M. Brown Act in adopting the Policy and "perhaps most egregiously, Plaintiffs had the audacity to snub their noses at the Court of Appeal by literally arguing that the underlying pursuit policy failed to comply with the provisions of Vehicle Code § 17004.7." The City cited Code of Civil Procedure sections 128.5, 1021.7, and 1038 in support of its fee request, and sought reimbursement for fees and costs for its work on the summary judgment motion and all subsequent proceedings.

The trial court granted the fee request in part. "Three arguments by the plaintiffs were raised in opposition to the Motion for Summary Judgment. In one of them, the plaintiffs claimed that the City's pursuit policy failed to comply with the Vehicle Code. The argument was so meritless that it could not have been raised in good faith. In propounding the argument, the plaintiffs completely ignored clear language in the earlier Court of Appeals opinion, where it was specifically held that the City's policy did comply with law. [¶] As to the other two claims, I cannot say with assurance that they were raised in subjective bad faith. The City of Albany will be awarded only a one-third prorated share of the $8,047.50 in attorney fees that it seeks. [¶] The plaintiffs are to pay a total of $2,682.50 in attorney fees as a sanction to defendant City of Albany. The City of Albany is also entitled to its costs in the amount of $911.04."

Plaintiffs appealed from both the judgment and the order awarding attorney fees.

II. DISCUSSION

On appeal, Plaintiffs argue that the Policy was not validly adopted under the APA, that the Policy does not comply with section 17004.7, subdivision (c), and that the trial court erred in awarding the City attorney fees.[4] We reject the first two arguments but find merit in the third.

A. Standard of Review

"On appeal from a summary judgment, an appellate court makes 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' [Citation.]" (*Mitchell v. United National Ins. Co.* (2005) 127 Cal.App.4th 457, 467.) Summary judgment is appropriate "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).)

B. Administrative Procedure Act

Plaintiffs argue that the APA applied to the police chief's adoption of the Policy because he was performing a quasi-legislative act delegated to the City by state statute, and that the Policy is invalid because he failed to comply with the APA's procedures for adopting regulations (Gov. Code, § 11340 et seq.).[5] We disagree.

The administrative rule-making provisions of the APA apply to any "state agency." (Gov. Code, § 11340.5, subd. (a).) Plaintiffs do not argue that the police chief, the Albany Police Department, or the City is a state agency. Instead, they argue that in

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[4] Plaintiffs do not renew here the claim of a Ralph M. Brown Act violation advanced below.

[5] "Chapter 3.5 (commencing with Section 11340) [governing rule-making], Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) [governing administrative adjudication] constitute, and may be cited as, the Administrative Procedure Act." (Gov. Code, § 11370.)

adopting a pursuit policy, the police chief exercised power delegated to him by state law, and that the APA's rule-making provisions apply in that context. The cases Plaintiffs cite do not support the argument.

Plaintiffs cite *Garner v. City of Riverside* and related cases that hold the administrative *adjudication* rules of the APA apply to specific disability retirement determinations that are expressly delegated by state law to local contracting agencies. (*Garner v. City of Riverside* (1985) 170 Cal.App.3d 510, 516 (*Garner*).) The administrative adjudication rules of the APA (Gov. Code, § 11500 et seq.) apply to state agencies only as expressly made applicable by statute. (Gov. Code, § 11500, subd. (a).) At the time of the administrative proceedings at issue in those cases, the Board of Administration of the Public Employees' Retirement System (PERS) was one such agency. (Former Gov. Code, § 11501, subd. (b)(49), operative until July 1, 1997 pursuant to Stats. 1995, ch. 938, § 523.)[6] The administrative adjudication rules of the APA recognize that a covered state agency's power to adjudicate may be delegated to another entity, which would then in turn be bound by the adjudication rules. (Gov. Code, § 11500, subd. (a).) Under the PERS disability retirement system, the power to determine whether certain local safety officers are disabled is expressly delegated by statute to the local contracting agency that employed the safety officers. (Gov. Code §§ 21154, 21156; see *Garner*, at p. 516 [discussing former Gov. Code, §§ 21024, 21025].) *Garner* and its sister cases hold that local contracting agencies, when exercising that delegated power, are governed by the administrative adjudication rules of the APA. (*Garner*, at p. 516; see also *Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208, 219; *Watkins v. City of Santa Ana* (1987) 189 Cal.App.3d 393, 396–397; *Ragan v. City of Hawthorne* (1989) 212 Cal.App.3d 1361, 1366; *Usher v. County of Monterey* (1998) 65 Cal.App.4th 210, 216.)

Here, the rule-making sections of the APA, rather than the administrative adjudication rules, are at issue. Plaintiffs cite no provision in the APA which provides

[6] The APA's administrative adjudication rules still apply to such proceedings pursuant to current Government Code section 21156.

that a state agency's *rule-making authority* may be delegated, or that the APA provisions would then apply to a delegatee. Nor do Plaintiffs cite any statute that delegates state agency rule-making authority to the City or its police department or police chief. Section 17004.7 provides that "adoption of a vehicle pursuit policy by a public agency pursuant to this section is discretionary" (§ 17004.7, subd. (a)), and grants immunity if the agency in its discretion decides to adopt such a policy in compliance with the statute (§ 17004.7, subd. (b)(1)). In contrast, the statutes relied on in *Garner* provide that on receiving an application for disability retirement from a local safety officer, "the board *shall request* the governing board of the contracting agency employing the member to make the determination [whether the member is incapacitated for the performance of duty]," and "[t]he governing body of a contracting agency upon receipt of the request of the board . . . *shall certify to the board its determination* under this section that the member is or is not incapacitated." (Gov. Code, §§ 21154, 21156, subd. (b)(1), italics added; see also *Garner, supra,* 170 Cal.App.3d at p. 515, quoting former Gov. Code, §§ 21024, 21025.)

Plaintiffs also cite *Pettye v. City and County of San Francisco* (2004) 118 Cal.App.4th 233 (*Pettye*) in support of their APA argument, but this case is likewise inapposite. The question addressed by *Pettye* is whether a state statute, which requires cities and counties to provide general assistance relief to the indigent and directs the county's *board of supervisors* to adopt standards of aid and care for this program, is an *exclusive* delegation of authority to the board of supervisors or whether the electorate can exercise such authority by way of initiative or referendum. (*Id.* at pp. 237–238, 244–246.) Although the court characterized the standards as "in the nature of administrative regulations," the court did not rely on the APA to resolve the case (either directly or by analogy), but instead surveyed and applied case law on the scope of the local initiative power. (*Id.* at pp. 240–244.) No issue of APA application was presented in the case. *Pettye* provides no support for Plaintiffs' argument.

C. Vehicle Code Section 17004.7

Plaintiffs again argue that the Policy does not fully comply with section 17004.7, specifically because it does not provide procedures for coordination with other jurisdictions. Plaintiffs raise no new arguments on this issue, but simply repeat the arguments made in the prior appeal (albeit in more abbreviated form).[7] Our prior decision on this issue is law of the case and dispositive. (*People v. Boyer* (2006) 38 Cal.4th 412, 441 (*Boyer*).)

Law of the Case and Dicta

The City contends that our analysis of the section 17004.7 issues in *Wang I* is law of the case, barring Plaintiffs from renewing their challenge to the Policy on this basis in the trial court. Plaintiffs assert that our discussion in that opinion was not necessary or essential to our decision, and was therefore only dicta, not binding on the parties, the trial court or this court.

" 'The law of the case doctrine states that when, in deciding an appeal, an appellate court "states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal." ' [Citation.]" (*Quackenbush v. Superior Court* (2000) 79 Cal.App.4th 867, 874 (*Quackenbush*).) In contrast, " 'discussion or determination of a point not necessary to the disposition of a question that is decisive of the appeal is generally recorded as obiter dictum and not as the law of the case.' [Citation.]" (*Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 498; *Quackenbush,* at p. 874.) The law of the case doctrine is a procedural rule precluding reconsideration of a previously decided issue in the same case. It is designed to prevent repetitive litigation of the same issue in a single criminal or civil case. (*Boyer, supra,* 38 Cal.4th at p. 441.)

[7] We take judicial notice of the briefs Plaintiffs filed in the prior appeal. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

The predicate for the prior appeal was the trial court's determination that the City's adoption of the Policy under section 17004.7 immunized it from liability—the ground upon which the court sustained the demurrer to Plaintiffs' complaint. The bases presented by Plaintiffs for the appeal were that: 1) the Policy did not comply with the requirements of section 17004.7 for coordinating pursuits with other jurisdictions, and 2) the trial court erred in taking judicial notice of the adoption of the policy. We found only the second contention to have merit and reversed and remanded on that ground. In doing so, however, we expressly addressed and rejected Plaintiffs' challenges to the adequacy of the Policy, holding that "The Policy meets the requirements of section 17004.7, subdivision (c)." We determined the statutory adequacy of the policy "in order to assist the trial court and the parties in the adjudication of the case after remand." We further wrote "[w]e recognize the public interest in resolving matters regarding vehicle pursuit policies expeditiously. It is in respect of this concern that we proceeded in this opinion to analyze the legal sufficiency of the Policy." (*Wang I, supra,* A114594.)

It is true that the only ground upon which we *reversed* the trial court was the evidentiary issue of improper judicial notice. We reached that issue because we found the trial court's ruling on the applicable substantive law to be correct. We did not undertake our discussion of the law applicable to pursuit policies under the Vehicle Code as an academic exercise or as an abstract exposition of legal principles. " 'A decision on a matter properly presented on a prior appeal becomes the law of the case even though it may not have been absolutely necessary to the determination of the question whether the judgment appealed from should be reversed. [Citations].' (*Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 Cal.2d 634, 643.) Thus, application of the law-of-the-case doctrine is appropriate where an issue presented and decided in the prior appeal, even if not essential to the appellate disposition, 'was proper as a guide to the court below on a new trial.' [Citation.]" (*Boyer, supra,* 38 Cal.4th at p. 442, parallel citations omitted.)

The issue of compliance of the Policy with statutory requirements was presented and decided in the prior appeal, and was "proper as a guide to the court below" on remand. Accordingly, the law of the case doctrine required the trial court, as it correctly

concluded, to accept and follow our decision on that issue in adjudicating the summary judgment motion. "[T]he doctrine of law of the case does not prevent retrial of an issue, [but] it does require that the same conclusion be reached if that matter is retried on the same evidence. [Citation.]" (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1261.)

Because no new issues have been raised and no new arguments presented on the issue of whether the Policy complies with section 17004.7, we simply incorporate by reference our detailed discussion of the issue in *Wang I.* We reiterate our holding that the Policy meets the requirements of section 17004.7, subdivision (c).

D. Attorney Fees

Plaintiffs argue that the court the court improperly awarded the City attorney fees as sanctions pursuant to Code of Civil Procedure sections 1021.7 and 1038. While a close question, we agree.

"Code of Civil Procedure section 1038 allows certain defendants, including public entities, to recover the costs of defending frivolous civil actions under the California Tort Claims Act . . . if the court determines the proceeding was not brought '*with reasonable cause and in the good faith belief* that there was a justifiable controversy under the facts and law. . . .' (Code Civ. Proc., § 1038, subd. (a).)"[8] (*Kobzoff v. Los Angeles County*

[8] The full text of Code of Civil Procedure section 1038, subdivision (a) reads: "In any civil proceeding under the California Tort Claims Act or for express or implied indemnity or for contribution in any civil action, the court, upon motion of the defendant or cross-defendant, shall, at the time of the granting of any summary judgment, motion for directed verdict, motion for judgment under Section 631.8, or any nonsuit dismissing the moving party other than the plaintiff, petitioner, cross-complainant, or intervenor, or at a later time set forth by rule of the Judicial Council adopted under Section 1034 determine whether or not the plaintiff, petitioner, cross-complainant, or intervenor brought the proceeding with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law which warranted the filing of the complaint, petition, cross-complaint, or complaint in intervention. If the court should determine that the proceeding was not brought in good faith and with reasonable cause, an additional issue shall be decided as to the defense costs reasonably and necessarily incurred by the party or parties opposing the proceeding, and the court shall render judgment in favor of that party in the amount of all reasonable and necessary defense costs, in addition to those costs normally awarded to the prevailing party. An award of

Harbor/UCLA Medical Center (1998) 19 Cal.4th 851, 853, fn. omitted, first ellipsis & italics added (*Kobzoff*).) "The 'good faith' and 'reasonable cause' requirements pertain not only to the action's initiation, but also its continued maintenance. [Citation.]" (*Id.* at p. 853, fn. 1.) Code of Civil Procedure section 1021.7 similarly provides, "In any action for damages arising out of the performance of a peace officer's duties, brought against . . . a public entity employing a peace officer . . . , the court may, in its discretion, award reasonable attorney's fees to the defendant or defendants as part of the costs, upon a finding by the court that the action was *not filed or maintained in good faith and with reasonable cause*." (Italics added.) Under Code of Civil Procedure section 1038, "defendants may recover defense costs . . . if the trial court finds the plaintiffs lacked *either* reasonable cause or good faith in filing and maintaining the lawsuit." (*Kobzoff,* at p. 853.) We assume for purposes of deciding this appeal that the same standard applies under Code of Civil Procedure section 1021.7.

" '*Good faith*, or its absence, involves a factual inquiry into the plaintiff's subjective state of mind [citations] . . . . [T]he question on appeal [is] whether the evidence of record was sufficient to sustain the trial court's finding. [¶] *Reasonable cause* is to be determined objectively, as a matter of law, on the basis of the facts known to the plaintiff when he or she filed or maintained the action. Once what the plaintiff (or his or her attorney) knew has been determined, or found to be undisputed, it is for the court to decide " ' "whether any reasonable attorney would have thought the claim tenable . . . ." ' " [Citations.] . . . [R]easonable cause is subject to de novo review on appeal.' " (*Clark v. Optical Coating Laboratory, Inc.* (2008) 165 Cal.App.4th 150, 183, quoting *Knight v. City of Capitola* (1992) 4 Cal.App.4th 918, 932.)

The basis on which the trial court awarded fees in this case is not entirely clear, since it appeared to conflate the elements of subjective bad faith and objective lack of reasonable cause. The trial court wrote, "To award attorney fees under either [Code of

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defense costs under this section shall not be made except on notice contained in a party's papers and an opportunity to be heard."

Civil Procedure section 1038 or 1021.7] the court must find at least some modicum of subjective bad faith . . . ." As noted, the Supreme Court has held that fees may be awarded for an action maintained *either* in bad faith or without reasonable cause. (*Kobzoff, supra,* 19 Cal.4th at p. 853.) The trial court further explained that a " 'subjective state of mind will rarely be susceptible of direct proof. Usually the trial court will be required to infer it from circumstantial evidence,' " and then concluded the Plaintiffs' argument under section 17004.7 "was so meritless that it could not have been raised in good faith." In other words, the court's finding of subjective bad faith appears to have been based solely on a finding that presenting the argument in light of our prior decision in *Wang I* was objectively unreasonable, and we discern no other basis in the record for the court's "bad faith" finding. Therefore, we review the trial court's decision de novo.

Our determination that the law of the case doctrine precluded Plaintiffs from relitigating the sufficiency of the Policy on the same grounds previously asserted does not, however, compel the conclusion that Plaintiffs were completely objectively unreasonable in arguing below that our prior opinion on the issue was "advisory," or that Plaintiffs could not have reasonably concluded that they were required to at least raise the issue at the risk of forfeiting it. Moreover, the trial court's statement that Plaintiffs "ignored" our prior opinion in their opposition to the summary judgment motion is inaccurate. Plaintiffs specifically addressed our opinion (which they characterized as an "advisory opinion") and responded to our conclusions. And in opposing the City's motion for fees, Plaintiffs reminded the trial court that they had in fact addressed this court's prior opinion in opposing summary judgment.[9]

[9] We are dismayed, however, that in their briefs in this appeal Plaintiffs do not specifically address our analysis of the issue in our opinion on the prior appeal or raise any new arguments on the issue. They do not renew the arguments they made below in opposition to summary judgment in the trial court that our analysis was flawed or that we failed to address a relevant section of the Policy. Nor do Plaintiffs state that they are making a perfunctory argument simply to preserve the issue for a petition for review to the Supreme Court. These facts influence our decision to award costs on appeal to the

The concept of "reasonable cause" under section 1038 "is synonymous with the term 'probable cause' in malicious prosecution law." (*Clark v. Optical Coating Laboratory, Inc.*, *supra*, 165 Cal.App.4th 150, 183.) This means that probable cause is lacking only in the total absence of merit—i.e., a position " 'so completely lacking in apparent merit that no reasonable attorney would have thought the position tenable.' " (*Id.* at p. 184.) In the circumstances presented here, we cannot say that Plaintiffs *totally* lacked any reasonable cause to renew their argument in opposition to summary judgment even though we had addressed and rejected the argument in our opinion on the prior appeal. The trial court therefore erred in awarding the City fees under Code of Civil Procedure sections 1021.7 and 1038.

III. DISPOSITION

The September 29, 2008 order granting summary judgment and the December 31, 2008 judgment are affirmed. The February 6, 2009 order awarding the City fees pursuant to Code of Civil Procedure sections 1021.7 and 1038 is reversed except insofar as it quantifies the costs the City should receive pursuant to the judgment. Plaintiffs shall pay the City's costs on appeal.

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Bruiniers, J.

We concur:

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Jones, P. J.

_____
Needham, J.

City despite Plaintiffs' partial success in this appeal. (See Cal. Rules of Court, rule 8.278(a)(3),(5).)